BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROLANDA JOHNSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,040,704
SUGARLOAF OF GREAT PLAINS	)	
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the July 13, 2010, preliminary hearing Order For Medical Treatment of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was awarded medical treatment to the left shoulder and neck after the ALJ determined that claimant's need for medical treatment for those body parts was related to claimant's original injury on March 25, 2005. Respondent was also ordered to furnish the names of three physicians to claimant's attorney for claimant to choose the authorized treating physician.

Claimant appeared by her attorney, Jan L. Fisher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, P. Kelly Donley of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held December 7, 2009, with attachments; the deposition of Terrence Pratt, M.D., taken May 11, 2010, with attachments; the transcript of Preliminary Hearing held July 12, 2010; and the documents filed of record in this matter.

ISSUES

Respondent raises the following issues to the Board in its appeal from the July 13, 2010, Order For Medical Treatment:

1. "Whether claimant's need for medical treatment to left shoulder and neck is related to original injury that occurred 3/25/05.

2. "Whether claimant suffered an intervening accident."[1]

Respondent contends that claimant was returned to work without restrictions from the March 25, 2005, right shoulder injury. Any need for medical treatment to her neck or left shoulder stems from a new series of microtraumas suffered while claimant continued working for respondent after her return to work on May 8, 2006. Claimant contends that her neck and left shoulder complaints are the result of overcompensation from the original right shoulder injury, coupled with the daily job requirements of her job with respondent.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order For Medical Treatment should be affirmed.

Claimant sustained a work-related injury to her right shoulder on March 25, 2005. Claimant underwent two surgeries to the right shoulder and was ultimately released from treatment without restrictions by Dr. Garcia, the authorized treating physician, and returned to work for respondent on May 8, 2006. Approximately two weeks after returning to work at her regular job, claimant began to develop symptoms of pain in her neck and left shoulder. Claimant attributed these new symptoms to the changes in her work activities necessitated by limitations in her right shoulder. Claimant described it as twisting and turning to get further extension from her right shoulder.[2] Additionally, claimant, who is naturally right-handed, was unable to perform the regular duties of the job with her right upper extremity to the extent she had before the March 25, 2005, accident. Claimant's left shoulder and cervical symptoms were present by the third week of May 2006. Claimant testified that she notified respondent of these new symptoms in a July 20, 2006, letter. The letter is undated, but claimant's testimony regarding the timing of the letter is not directly controverted in this record. The letter, which was introduced as exhibit 4 to the Terrence Pratt, M.D., deposition, mentions neck pain but does not mention the left upper extremity. Claimant last worked for respondent on April 25, 2007. She has not worked, except in her home, since.

Claimant has been examined and treated by several health care providers. However, with the exception of an MRI report of December 20, 2007, and the medical reports of the IME examining physician, Terrence Pratt, M.D., of Rockhill Orthopaedics, P.C., no medical reports were introduced into this record. Dr. Pratt did comment in his May 15, 2009, report on several of the records of prior treating physicians which were

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[1] Appeal of Preliminary Hearing Order Dated July 13, 2010, at 1.

[2] P.H. Trans. (July 12, 2010) at 23-24.

provided for his review. The medical report of Dr. Pratt from August 4, 2009, indicates claimant first complained of neck pain on July 18, 2006, while attending physical therapy. That report does not discuss the left shoulder. Claimant testified that her neck and left shoulder began hurting within two weeks of her return to work in May 2006. However, the record fails to display left shoulder complaints in the medical reports until November 2008.

On March 25, 2009, the parties agreed to refer claimant to Dr. Pratt for a neutral independent medical evaluation (IME). The evaluation occurred on May 15, 2009, and a report of that date was issued. Dr. Pratt was provided medical reports from Dr. Brown, Dr. Reed, Dr. Shah, Dr Hunsberger and Dr. Garcia, the MRI reports of claimant's right shoulder and cervical spine, and the physical therapy reports from Sand Hill. Dr. Pratt noted that claimant had cervicothoracic complaints with no evidence of an injury to her cervical region from the 2005 accident and left shoulder complaints with no evidence of left shoulder complaints until November of 2008. Claimant was rated at 21 percent to the right upper extremity at the level of the shoulder and restricted from any lifting over 25 pounds, overhead lifting was limited to 15 pounds and no frequent overhead activities with the right upper extremity. Claimant was prohibited from pushing or pulling in excess of 50 pounds. Dr. Pratt was unable to relate claimant's cervical or left shoulder symptoms directly to her reported accident in 2005.

Dr. Pratt was then provided medical reports from Dr. Shah from November 20, 2006, until June 6, 2007, therapy reports from Siena Medical Clinic and a Heartland Hand and Spine form noting a pain diagram displaying cervical, thoracic and bilateral shoulder involvement from December 17, 2007. After reviewing the added medical reports, Dr. Pratt stated in his August 4, 2009, report that the statement from the original report remained appropriate.

At the time of his deposition, Dr. Pratt acknowledged that claimant was experiencing cervical symptoms shortly after her return to her regular job with respondent. He also agreed that claimant's return to full duty could be vocationally related to the development of left shoulder and cervical symptoms. However, claimant never described this injury series to Dr. Pratt. After reviewing the task list generated by vocational expert Doug Lindahl, Dr. Pratt determined that tasks numbered 6 and 10 could cause cervical injuries if done one-third of a workday or more, but was unwilling to state so within reasonable medical probability. At the preliminary hearing on July 12, 2010, claimant testified that she was required to perform work above shoulder level while performing tasks numbered 6, 8 and 10. Claimant stated that she would spend more than one-third of an average day performing these activities above shoulder level while involved in those tasks.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[7]

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[3] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[8] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[9] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[10] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[11] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury,

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[8] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[9] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[10] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[11] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[12]

In *Logsdon*,[13] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Finally, in *Casco*,[14] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

Claimant returned to her regular job with respondent without restriction after undergoing two right shoulder surgeries. Claimant displayed ongoing symptoms in her right shoulder which necessitated that she compensate by overusing her left shoulder. This overcompensation led to symptoms in her left shoulder and her neck. While Dr. Pratt was reluctant to find that the right shoulder injury was directly responsible for the left shoulder and neck problems, he did acknowledge that certain of the tasks in Doug Lindahl's list could cause the cervical injury if performed over one-third of the day. Claimant's testimony supports a finding that she did perform over the shoulder work for at least one-third of the workday. This Board Member finds that claimant did suffer work-related injuries to her left shoulder and cervical spine as the result of overcompensating for the damaged right shoulder. Therefore, those injuries are a natural consequence of the March 25, 2005, accident and resulting injury. The July 13, 2010, Order For Medical Treatment of the ALJ is affirmed.

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[12] *Id.* at 728.

[13] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

[14] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied her burden of proving, for preliminary hearing purposes, that she suffered injury by accident to her left shoulder and cervical spine as the result of overcompensating for the original right shoulder injury of March 25, 2005. The Order For Medical Treatment of the ALJ granting claimant medical treatment is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Medical Treatment of Administrative Law Judge Pamela J. Fuller dated July 13, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September, 2010.

HONORABLE GARY M. KORTE

c: Jan L. Fisher, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

[15] K.S.A. 44-534a.